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# THE OMBUDSMAN AND SIMILAR INSTITUTIONS

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# THE OMBUDSMAN AND SIMILAR INSTITUTIONS

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November 1981

HUMAN RIGHTS DIRECTORATE  
DEPARTMENT OF THE SECRETARY OF STATE

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# THE OMBUDSMAN AND SIMILAR INSTITUTIONS

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Foreword (iii)

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Cat. No. S2-100/1981E

ISBN 0-662-11784-0




## FOREWORD

The report on the Ombudsman and Similar Institutions was made possible through close cooperation of the federal and provincial governments. It was prepared as Canada's contribution to the United Nations Yearbook on Human Rights.

The report discusses three complaint-handling agencies at the federal level, the Privacy Commissioner, the Official Languages Commissioner and the Correctional Investigator as well as the nine provincial ombudsman institutions. Only the province of Prince Edward Island, the Northwest Territories and the Yukon have not yet established the ombudsman institution.

The role, duties and powers of the ombudsman are listed, along with their method of appointment, legislative base and date of enforcement. The impact of their roles on the protection of human rights is also indicated with case studies presented as illustrations.



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PART I

GENERAL INTRODUCTION

This report has been prepared in response to the invitation by the Secretary General of the United Nations in Note No. G/SO 213(1-2) 1977-78, dated July 16, 1979, and in accordance with Resolution 1793 (LIV) passed by the Economic and Social Council on May 18, 1973.

Canada has regularly contributed to the United Nations Yearbook on Human Rights since the program began in 1946. Previous Canadian contributions have described the main steps taken in Canada for the protection and promotion of human rights and fundamental freedoms. These contributions and other reports submitted to the Secretary General included references to human rights legislation passed in large part during the last two decades by the provincial legislatures and the Parliament of Canada, and to ordinances on the same subjects passed by the Legislative Assemblies of the Northwest Territories and the Yukon. These reports described the role of human rights commissions in ensuring implementation of this legislation at both the federal and provincial levels and in educating the public on the principles advanced.

The various reports submitted previously also described numerous other measures taken by federal and provincial government departments and agencies to ensure that the principles set out in the Universal Declaration of Human Rights and in the various related instruments passed by the United Nations were respected and applied.

Of the governmental institutions which are involved in the protection of human rights, particular attention should be given to the provincial ombudsman and corresponding federal institutions that have been created in Canada in the last fifteen years. Because these institutions have played a special role in safeguarding the rights of the individual, Canada's contribution to the United Nations Yearbook on Human Rights for 1977 and 1978 will be entirely dedicated to them.

A. The Ombudsman in Canada

In Canada, while the legislation was drafted to provide for the role of an official federal ombudsman in 1977, it has not yet been enacted. This report discusses three complaint-handling agencies at the federal level (The Privacy Commissioner, the Official Languages Commissioner and the Correctional Investigator) as well as the nine provincial ombudsman institutions. The role, duties and powers of these individuals are listed, along with their method of appointment, legislative base and date of enforcement. The impact of their roles on the protection of human rights is included, with case studies used as examples.

All provinces except for Prince Edward Island have established their own legislation pertaining to the role of the ombudsman. Their submissions are included in this report. There are no contributions from the Yukon or Northwest Territories, as they are administered by the federal government, and do not have an ombudsman at this time.



## B. Rationale for the Ombudsman Institution

The Ombudsman's Office of the Province of Ontario suggests the following rationale:

"Our governments enact laws with a view to regulating our conduct toward one another which may in some ways derogate from our individual freedoms but which are calculated for the long term betterment of society as a whole. At this point in our history we are witness to a trend that sees the state taking an increasingly positive role in an expanding array of previously unaffected areas, and the accompanying regulatory framework touches each and every one of us in a myriad and sometimes frightening number of ways. Thus a degree of tension between the state and the individual is inevitable.

If the well being of society is to be perpetuated, public confidence in the administration of the law is of fundamental importance. Individuals must be secure in the knowledge that the powers of the state will be exercised fairly and equitably and in accordance with natural justice and the rule of law."

To aid in providing this security, governments appoint individuals to fulfill the role of ombudsman (defined in Webster's New Collegiate Dictionary, 1980, as):

"a government official ... appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials."

## C. Events Involving the Ombudsman - 1977-78

Alberta was the first of the provincial governments to prepare legislation pertaining to the role of the ombudsman. According to the 1977 Annual Report prepared by the Alberta Ombudsman:

"It must be recognized that Ombudsmanship has at last a strong international base. What is perhaps more important is that Alberta has been the initiator, and through the First International Ombudsman Conference in Edmonton, has laid the foundation for this development. Additionally, it is very significant that the International Ombudsman Steering Committee selected the University of Alberta as the site of the International Ombudsman Institute."

The meeting of the International Ombudsman Steering Committee held in Paris, France, in May 1977, accepted the proposal of the Faculty of Law, University of Alberta ... in the following resolution.

It was universally resolved that:

1. This Committee is in favour of institutionalizing in a coordinated manner, the research and documentation of ombudsmen functions and activities in their various forms on a worldwide basis.
2. In this sense, the Committee endorses and accepts the proposal for establishing an Ombudsman Institute at the University of Alberta, Canada, in accordance with the document dated April 21, 1977 submitted to this Committee by Dr. Randall Ivany.
3. The Committee invites and would welcome the establishment of a parallel institute in Stockholm, Sweden.
4. The Committee would be pleased to receive and to consider in due time proposals designed especially to meet the needs of the Third World in this field.
5. It is clarified and resolved that the duty of the Steering Committee is in the field of coordination and a provision of professional advice, but not in that of funding.
6. In the interests of securing coordination, the Steering Committee may, from time to time, make such further suggestions and recommendations as it may deem appropriate.

The Institute is incorporated as a non-profit organization under the Canada Corporation Act with the following objects:

- (a) to promote the concept of ombudsman and to encourage its development throughout the world;
- (b) to encourage and support research and study into the office of the ombudsman;
- (c) to develop and operate educational programs for ombudsmen, their staff and other interested people;
- (d) to collect, store, disseminate information and research data about the Institute of the Ombudsman;
- (e) to develop and operate programs enabling an exchange of information and experience between ombudsmen throughout the world;

- (f) to provide scholarships, fellowships, grants and other types of financial support to individuals throughout the world to encourage study and research into the institution of ombudsmen;
- (g) such other matters as are necessary to further the above objects,

and recognition as a charitable organization has been received from the Department of National Revenue.

In 1977, the Canadian Ombudsman Conference was hosted by the Ontario Ombudsman. The theme was: "the Ombudsman Plan ... An Extension of Democracy?"

The following resolution was unanimously passed at the conference:

Whereas, the ombudsman concept continues to expand throughout the world, and

Whereas, 1977 marks the tenth anniversary of the introduction of the concept in Canada, and

Whereas, all citizens of Canada should have access to an ombudsman to deal with grievances against governmental authorities, therefore,

Be it resolved, that the Canadian National Ombudsman Conference welcomes the establishment of the Office of an Ombudsman in British Columbia by the British Columbia Legislative Assembly, and encourages debate and discussion with the Legislatures and Parliaments of Canada of proposals that would extend the ombudsman concept to all citizens of Canada, for all levels of government.

The 1978 Canadian Ombudsman Conference was held in Winnipeg, Manitoba.



PART II

FEDERAL INSTITUTIONS

A news release from the Minister of Justice dated December 19, 1977 suggested that:

"a federal Ombudsman be established as an independent officer of Parliament. He would be empowered to investigate complaints about administrative actions or inactions from members of the public who have not received satisfaction through the normal departmental complaint-handling channels. Like his counterparts in the provinces and New Zealand and Australia, the Ombudsman would be given powers of investigation and reporting which would enable him to encourage authorities to rectify justified complaints and, all else failing, to report to Parliament where his recommendations are not followed."

As mentioned previously, legislation pertaining to a federal Ombudsman for Canada was drafted in 1977, but has still not been enacted. The three ombudsmen-like institutions which presently exist at the federal level are defined according to the news release referred to above.

This report discusses the three complaint-handling institutions at the federal level (the Privacy Commissioner, the Official Languages Commissioner and the Correctional Investigator).

The Commissioner of Official Languages

appointed by Parliament under Section 19 of the Official Languages Act, has ombudsman-like powers in respect of language complaints. He also has an important duty which goes far beyond this - that of ensuring recognition of the status of each of the official languages.

The Privacy Commissioner<sup>1</sup>

created under Part IV of the Canadian Human Rights Act. The Act provides the citizen who feels that he has been improperly denied access to his personal information held in government files, with recourse to an independent officer empowered to investigate his complaint, encourage rectification where warranted, and to report to Parliament as appropriate.

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<sup>1</sup> The role of the Privacy Commissioner (created under Part IV of the Canadian Human Rights Act), is presented without outlining the functions of the Human Rights Commission, as the Commission has been discussed in previous United Nations submissions.

## The Correctional Investigator

appointed by the Governor in Council, has the status of Commissioner under the Inquiries Act with authority to investigate and report to the Solicitor General on the complaints and grievances of inmates of federal penitentiaries.

### A. The Commissioner of Official Languages

#### Role, duties, powers

The Commissioner of Official Languages is an officer of the Canadian Parliament charged with the task of furthering language reform in the federal administration. He is responsible for overseeing the application of the Official Languages Act in all departments and agencies of the federal government.

The essential requirements of the Act are that federal government institutions be able to provide their services to the public in either English or French. It is also construed to mean that, within the administrative apparatus, public servants should, wherever possible, be able to work in the official language of their choice. The task of ensuring compliance with the Act falls on the Commissioner of Official Languages, although the day-to-day implementation of policy rests with some 150 departments and agencies of the federal administration.

#### Method of appointment, legislation, date of enforcement

The post of languages commissioner is a relatively recent innovation resulting from the adoption in 1969 of the federal Official Languages Act, which declares that:

The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.

The commissioner is appointed for seven years, reports directly to Parliament and is entirely independent of the government of the day. This independence is essential, given the nature of the position, which implies critical scrutiny of government.

#### The Protection of Language Rights: The Commissioner's Role

The role of the commissioner has evolved and developed over the past decade to the point where three major functions and modes of operation have become clearly identified within his office.

The first dimension is that of language ombudsman whereby the Commissioner's Office receives complaints from individuals who believe their rights under the Official Languages Act have not been respected by a federal department or agency. In this role, the commissioner assumes the standard functions of the ombudsman by investigating complaints and recommending corrective measures where necessary. The Act obliges the commissioner to investigate:

any complaint made to him to the effect that, in any particular instance or case,

- a) "the status of an official language was not or is not being complied with or,
- b) the spirit and intent of this Act was not or is not being recognized in the administration of the affairs of any of the institutions of the Parliament or Government of Canada."

In addition, Section 25 of the Act gives the commissioner the discretion to investigate problems or issues on his own initiative, without having to wait for complaints. Out of this discretionary authority has developed the second function of his office - that of linguistic auditor of the federal administration. As auditor, the Commissioner's Office conducts regular studies of federal departments and agencies to assess to what extent they respect both the letter and the spirit of the Act and to make recommendations aimed at improving linguistic performance. In order to carry out any investigation under the Act, the commissioner has the power:

"to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of any matter within his authority under this Act, in the same manner and to the same extent as a superior court of record."

However, as is the case generally with ombudsmen, the commissioner has no statutory power to compel institutions to comply with his recommendations; his is largely a moral authority. He can seek to persuade and convince, but his ultimate strength lies in the reports he makes to Parliament which serve to publicize governmental shortcomings.

In addition to the two basic tasks of ombudsman and auditor, the commissioner fulfills another role in accordance with his statutory responsibility of pursuing the "spirit" as well as the letter of the law. He seeks to explain the Act to the general public and to public servants, as well as to promote mutual understanding between Canada's two major linguistic groups. Although his mandate under law applies only at the federal level, the spirit of language reform goes beyond jurisdictional and legal boundaries so that the commissioner keeps abreast of and comments upon language issues beyond the federal sphere.



## Case Studies

The effectiveness of any ombudsman's office can be measured by its success in resolving individual complaints and by its ability to bring about the kinds of institutional change which remove causes of complaints. The Commissioner's Office deals with over 1,000 complaints a year. Such complaints serve as a barometer for measuring the success and failures of the government's official languages program. The problems members of the public or public servants may bring to his attention were encapsulated in the following passage of the Commissioner's Annual Report to Parliament for 1978:

"In our business, sins of omission are the rule. Consider, for example, the director who forgets about the need for a French version of a departmental publication until the English version is ready for release. Or the central agency that issues a directive on better service to the public and says nothing about language of service. Or the manager who accepts barely readable French because quality control is not his business. Or the personnel officer who fails to consider that a job applicant would like to be interviewed in his own language. These are petty offences no doubt, unless you happen to be on the receiving end."

In some cases, the resolution of a complaint brings about benefits to a whole category of people, not just to the individual who protests that his language rights have been infringed by a federal institution. The two following examples help illustrate this point and also how the commissioner functions to protect language rights.

(1) The naturalization ceremony is of great symbolic significance. It is therefore particularly important that it should make appropriate provision for the use of both official languages.

In 1978, the commissioner received a complaint describing the proceedings before a citizenship judge during which neither the judge nor the clerk was able to speak French. The commissioner urged the Privy Council to study the possibility of making bilingualism a criterion for appointing citizenship judges. He also sought to include knowledge of English and French as a requirement for the position of Clerk in the naturalization ceremony. The responsible authorities agreed that clerks should be able to read and write both languages and be able to make a short verbal presentation in English and French during a naturalization ceremony. A brief bilingual text would be prepared and unilingual clerks given assistance with their pronunciation.

(2) A Canadian working abroad informed the commissioner that the local Passport Office had not only filled out his infant son's Certificate of Canadian Citizenship in English but had also forwarded it under cover of a letter in English, although it should have been quite clear that the family was French-speaking.



The responsible authorities admitted that a mistake had been made since the application for the certificate had been completed in French. A new certificate in French was issued immediately to the complainant.

B. The Privacy Commissioner

Role, duties, powers

The primary function of the Privacy Commissioner is to deal with complaints from the public that they have not received that to which they are entitled under Part IV of the Canadian Human Rights Act.

Part IV of the Canadian Human Rights Act gives expression to generally accepted personal information rights. The purpose, as stated in the Act, is to protect the privacy of individuals and their right of access to records concerning them "to the greatest extent consistent with the public interest."

The rights relate to access, correction and use of personal information held by federal government departments and institutions listed in the Act. In particular, "an individual" has the right, in respect of records held by the federal government:

- (a) to ascertain what records concerning the individual inquiring that are used for administrative purposes;
- (b) to ascertain the uses to which such information has been put since the proclamation of Part IV which took place on the 1st of March 1978;
- (c) to examine such records or copies thereof, regardless of who provided the information;
- (d) to request correction of the personal information; and
- (e) to require a notation on the record if the correction is not accepted.

An individual is defined as someone who is a Canadian or who has lawfully been admitted to Canada for permanent residence.

"Complaints are accepted from anyone after they have tried to exercise their rights under the legislation. Complaints normally refer to a specific act or omission at the administrative or ministerial level in any government department or institution listed in the Schedule to the "Act"."

Method of appointment, legislation, date of enforcement

"The Privacy Commissioner is a full-time member of the Canadian Human Rights Commission, who, on the recommendation of the Chairman of that Commission, has been designated by the Minister of Justice to be responsible for personal information complaints. The appointment of the incumbent Privacy Commissioner is for four years and a Privacy Commissioner may only be removed by the Governor in Council on address of the Senate and the House of Commons."

The Privacy Commissioner assumed office October 1, 1977 and Parts II, III and IV of the Canadian Human Rights Act came into force on March 1, 1978.

The Protection of Human Rights: The Commissioner's Role

The Privacy Commissioner has a statutory duty to investigate all complaints. For purposes of investigation, the Privacy Commissioner has the same authority as a Superior Court Judge to compel the attendance of witnesses and the production of documents and has access to government premises concerned in an investigation, subject only to restrictions that may be placed upon the Privacy Commissioner by the Governor in Council in the interest of national defence or security. No such restrictions have been imposed.

The Privacy Commissioner cannot investigate on his own initiative and has no authority to become involved in general questions of invasion of privacy or the propriety of administrative decisions based on information on file.

The Privacy Commissioner's authority and methods of operation are similar to those of an ombudsman. Investigations may lead to the resolution of complaints of oversight, error or hardship by means of mediation, and to recommendations directed to ministers where individuals have not been granted that to which they are entitled. Findings and recommendations must be communicated to the complainant concerned.

The Act places certain limits on the use that the federal government may make of personal information that has been provided by an individual. Information provided for one purpose must not be made available for an administrative purpose that is not related to the original purpose for which it was obtained, unless that use is otherwise authorized by law, or the government gives notice to the individual of the proposed use and he or she does not object.

The right of access is not absolute. Information may be withheld by Cabinet order or by a minister to protect international relations, national defence, national security, or federal-provincial relations and investigations pertaining to the investigation and suppression of crimes or enforcement of federal acts.

In respect of a person under sentence for an offence, information may be withheld if disclosure, in a minister's opinion, might lead to a serious disruption of the individual's institutional, parole or mandatory supervision program, or reveal information that was originally obtained on an implied or express promise of confidentiality, or result in physical or other harm to the person under sentence or to any other person. Exemptions may also be claimed by ministers in respect of information that might reveal personal information concerning another individual, impede the functioning of a court of law, a quasi-judicial board, commission or other tribunal under the Inquiries Act, or disclose legal opinion or advice to a government institution, or privileged communications between lawyer and client in a matter of government business.

### General Information

The responsibility for administering the personal information rights rests on the individual federal government departments and institutions. The Treasury Board coordinates the service to the public, issues directives to ensure uniform practices and publishes the Index which describes every personal information bank maintained by the federal government. The Index is available to the public together with appropriate application forms in most post offices. The Minister of Justice publicly stated during discussion of the Act in bill form that the federal government has no secret personal information banks.

An individual who wishes to exercise the rights under the Act must choose the specific data banks he or she wishes to search, fill in application forms for access or correction and mail them to each of the government departments concerned. There is no centralized or inter-connected personal information system in the federal government.

An annual report on the commissioner's activities must be made to Parliament.

### C. The Correctional Investigator

#### Role, duties, powers

The Correctional Investigator's role is:

"to investigate, on his own initiative, on request from the Solicitor General of Canada, or on complaint from or on behalf of inmates as defined in the Penitentiary Act, and report upon problems of inmates that come within the responsibility of the Solicitor General of Canada, other than problems raised on complaint

- a) concerning any subject matter or condition that ceased to exist or to be the subject of complaint more than one year before the lodging of the complaint with the Commissioner,

- b) where the person complaining has not in the opinion of the Commissioner, taken all reasonable steps to exhaust available legal or administrative remedies, or
- c) concerning any subject matters or conditions falling under the responsibility of the Solicitor General of Canada that extend to and encompass the preparation of material for consideration of the National Parole Board,

The Commissioner need not investigate if

- d) the subject matter of a complaint has previously been investigated, or
- e) in the opinion of the Commissioner, a person complaining has no valid interest in the matter.

It is suggested:

1. that the Commissioner be appointed at pleasure;
2. that the Commissioner be paid at the salary set out in the schedule hereto;
3. that the Commissioner be authorized to engage, with the concurrence of the Solicitor General of Canada, the services of such experts and other persons as are referred to in section 11 of the Inquiries Act, who shall receive such remuneration and reimbursement as may be approved by Treasury Board; and
4. that the Commissioner shall submit an annual report to the Solicitor General of Canada regarding problems investigated and action taken."

Some reservations have been expressed about the credibility of a Correctional Investigator reporting to the minister who has responsibility for the Canadian Penitentiary Service.

"No matter how properly the Correctional Investigator performs his task, there will always be complications under the present terms of reference. It is not so much whether there is actual direction by the Minister, but how the office is perceived by the inmates. If the office appears to be part of the Ministry it loses credibility and the task becomes more difficult.



I reiterate, no interference has been encountered and none is anticipated but the Ombudsman can only be effective if the office maintains a high level of credibility.

The foregoing is not described to solicit support for a return to the wording of the original mandate. I merely wish to point out some of the difficulties inherent in the job of the Correctional Investigator as compared with an Ombudsman who reports to Parliament."

#### Method of appointment, legislation, date of enforcement

The Correctional Investigator is a commissioner appointed by the Solicitor General pursuant to Part II of the Inquiries act whose mandate is to investigate and make recommendations on inmate complaints as a last resort.

The office of the Correctional Investigator was first established in June 1973.

#### The Protection of Human Rights: The Investigator's Role

##### Right of Access

- a) "In order to exercise the above described authority, the Correctional Investigator and the Inquiries Officers shall be given unlimited right of access to inmates in all Canadian penitentiaries, and in the discharge of their responsibilities may:
  - 1) make regular announced visits to all institutions, and
  - 2) make irregular unannounced visits to institutions as is deemed advisable.
- b) As soon as notice of a regular announced visit is received, the matter shall be publicized to the inmate population, and private interviews shall be arranged where:
  - 1) the Correctional Investigator or an Inquiries Officer wishes to interview an inmate, or
  - 2) an inmate wishes to have an interview with the Correctional Investigator or Inquiries Officer.

- c) The Correctional Investigator and the Inquiries Officers shall be provided with all the information that they request that pertains to any investigation; this includes the provision of copies of documents for retention, as required."

#### Staff Cooperation

"Canadian Penitentiary Services (CPS) staff members shall cooperate fully with the Correctional Investigator and the Inquiries Officers in the discharge of their responsibilities."

#### Handling of Correspondence

- a) "Correspondence from inmates to the Office of the Correctional Investigator shall be mailed from the institution unopened.
- b) Correspondence from the Office of the Correctional Investigator to inmates shall be delivered to the inmates unopened."

#### Case Studies

We received a complaint from an inmate at a maximum security institution that he was being unfairly denied transfer to medium security. Our investigation indicated that because there was a lack of space in medium security in the region certain staff in the classification area were just not processing transfer applications. In this particular case the Classification Officer insisted that the inmate admit his guilt of the offence for which he was convicted before his transfer application would be processed. This approach was questioned by our office and the matter was subsequently reviewed by senior staff persons. We later learned that the inmate was assigned a different Classification Officer and that his transfer would be put forward without further delay.

#### General Information

The majority of complaints received by this office centre around transfers, and medical/health care problems.

Most complaints concerning transfer fall into one of three types: those dealing with transfer to greater security usually accompanied with the allegation that no valid reason was given; those denying transfer to lesser security; and, those denying transfer to an institution in another region.

PART III

PROVINCIAL INSTITUTIONS

A. Legislative base for the ombudsman's role, duties and powers

Legislation pertaining to the role of the ombudsman, is essentially the same in all provinces where such legislation exists. All provincial Acts have been studied and clauses which are thought to be especially relevant to this report, have been identified. Some examples are outlined below.

1. Investigation: provincial legislation states that the ombudsman's investigation is to be conducted in private, unless the ombudsman feels that public knowledge is necessary for his purposes, e.g. in the Province of Saskatchewan:

"The ombudsman may hold hearings and hear or obtain information from any person he thinks fit and may make such inquiries as he thinks necessary.

The ombudsman is not required to hold a hearing and no person is entitled as of right to be heard by the Ombudsman."

2. Oath of Office: provincial legislation require the ombudsman and his staff to take an oath of office, as seen in the example from British Columbia:

"The ombudsman and every person on his staff shall, subject to this Act, maintain confidentiality in respect of all matters that come to their knowledge in the performance of their duties under this Act.

Neither the ombudsman nor a person holding an office or appointment under the ombudsman shall give or be compelled to give evidence in a court or in proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of his duties under this Act, except to enforce his powers of investigation, compliance with this Act, or with respect to a trial of a person for perjury."

3. Powers and duties: provincial legislation describes the powers and duties of the ombudsman. The legislation from Saskatchewan serves as an example:

"12.(1) It is the duty of the Ombudsman and he has power to investigate any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration and affecting any person or

body of persons in his or its personal capacity, in or by a department or agency employee or member thereof in the exercise of any power, duty or function conferred or imposed on him by any Act whereby any person is or may be aggrieved.

(2) The ombudsman may make an investigation of a matter either on a written complaint made to him by any person or of his own motion and he may commence an investigation notwithstanding that the complaint may not on its face be against a decision, recommendation, act or omission mentioned in subsection (1).

(3) A committee of the Assembly may at any time refer to the Ombudsman for investigation and report any petition or matter that is before the committee for consideration and the Ombudsman shall:

- a) subject to any special directions of the committee, investigate the petition or matter referred to him so far as it is within his jurisdiction; and
- b) make such report to the committee as he thinks fit.

(4) The Lieutenant Governor in Council may at any time refer to the Ombudsman for investigation and report any matter relating to the administration in or by any department or agency of the government or by any officer, employee or member thereof and the ombudsman shall:

- a) subject to any special directions of the Lieutenant Governor in Council, investigate the matter referred to him so far as it is within his jurisdiction; and
- b) make such report to the Lieutenant Governor in Council as he thinks fit."

4. Content of Application: provincial legislation states that a complaint must be submitted to the ombudsman in writing. Letters written by those detained in correctional or mental health facilities must be forwarded to the ombudsman, unopened. Quebec is used as an example:



"Every person who applies to the Public Protector to make an investigation must do so in writing, indicating his surname, given names, address and occupation, and state the facts giving rise to his application.

Any holder of a function, office or employment in an institution for mental patients or in a place where persons are detained following an information, indictment or conviction, when such function, office or employment is under the government or a department or body thereof, shall, when a writing addressed to the Public Protector is given to him, transmit such writing forthwith to the Public Protector and shall not take cognizance of the contents thereof.

The Public Protector, his assistant, functionaries and employees must lend their assistance in the drafting of an application for an investigation to any person who so requires."

5. Jurisdiction of Ombudsman: provincial legislation addresses the issue of the limits of the ombudsman's jurisdiction. Legislation from Newfoundland is representative of most of the provincial Acts. Saskatchewan's legislation is included, as it outlines a greater number of restrictions.

"Nothing in this Act authorizes the Commissioner to investigate

a) any decision, recommendation, act or omission in respect of which there is under any Act a right of appeal or objection or a right to apply for a review on the merits of the case to any court or to any tribunal constituted by or under any Act, until after that right of appeal or objection or application has been exercised in the particular case or until after the time prescribed for the exercise of that right has expired; or

b) any decision, recommendation, act or omission of any person acting as a solicitor for the Crown or acting as counsel for the Crown in relation to any proceedings.

If any question arises as to whether the Commissioner has jurisdiction to investigate any case or class of cases under this Act, he may, if he thinks fit, apply to the Supreme Court of Newfoundland for a declaratory order determining the question.

Nothing in the Saskatchewan Act authorizes the Ombudsman to investigate:

- a) any decision, recommendation, act, order or omission of the Assembly, a committee of the Assembly, the Lieutenant Governor in Council, the Executive Council or a member or committee of the Executive Council;
- b) any decision, order or omission of a court, a judge of a court, a referee or local master of a court, a magistrate or a justice of the peace made or given in any action or proceeding in the court or before the judge, referee, local master, magistrate or justice of the peace;
- c) any award, decision, recommendation or omission of an arbitrator, or board of arbitrators, established by or under any Act;
- d) any decision, recommendation, act or omission in respect of which there is under an Act a right of appeal or objection or a right to apply for a review of the merits of the case to any court or tribunal constituted by or under an Act, whether or not that right of appeal, objection or application has been exercised in the particular case and whether or not any time prescribed for the exercise of that right has expired, unless the Ombudsman is satisfied that in the particular case it would have been unreasonable to expect the complainant to resort to the court or tribunal, but in that case the investigation shall not commence until after the time for the exercise of that right to appeal, object or apply has expired;
- e) any decision, recommendation, act or omission of any person acting as solicitor or counsel for the Crown in relation to any proceedings;

f) any decision, recommendation, act or omission of a deputy minister, an acting deputy minister, associate deputy minister or assistant deputy minister when acting as such or of any person who by virtue of his appointment or actual employment is expressly or by necessary implication directly responsible to a minister;

g) any decision, recommendation, act, order or omission of any department or agency of the government, or an officer, employee or person, in relation to any matter arising between the department, agency, officer, employee or person, and the government of another province or the Government of Canada or a municipality or school board.

(2) Where a dispute arises as to whether a person mentioned in clause (f) of subsection (1) is a person who by virtue of his appointment or actual employment is expressly or by necessary implication responsible to a Minister, the dispute shall be referred to and be determined by the Attorney General and the decision of the Attorney General is final."

6. Refusal to investigate: provincial legislation permits the ombudsman to refuse to investigate as outlined in Manitoba's Act:

"The Ombudsman in his discretion, may refuse to investigate or may cease to investigate a complaint if

a) it relates to any decision, recommendation, act or omission of which the complainant has had knowledge for more than one year before the complaint is received by the Ombudsman; or

b) in his opinion it is frivolous or vexatious or not made in good faith or concerns a trivial matter; or

c) in his opinion, upon a balance between the public interest and the person aggrieved, it should not be investigated or the investigation should not be continued; or

d) in his opinion the circumstances of the case do not require investigation."

Saskatchewan's Act suggests that the ombudsman may, for special reasons, investigate a complaint, even though it was not made within twelve months after the occurrence of the event that gave rise to the complaint.

7. Notice of investigation: provincial legislation outlines the ombudsman's responsibility to notify authorities regarding an investigation. Alberta legislation is given as example:

"S.15(1) Before investigating any matter under this Act, the Ombudsman shall inform the deputy minister of the department or the administrative head of the agency affected, as the case may be, of his intention to make the investigation.

(2) The Ombudsman may, in his discretion, at any time during or after an investigation consult any Minister who is concerned in the matter of the investigation.

(3) On the request of any Minister in relation to an investigation or in any case where an investigation relates to any recommendation made to a Minister, the Ombudsman shall consult that Minister after making the investigation and before forming a final opinion on any of the matters referred to in section 20, subsection (1) or (2).

(4) If, during or after an investigation, the Ombudsman is of opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee of any department or agency, he shall refer the matter to the deputy minister of the department or the administrative head of the agency, as the case may be."

8. Power of investigation: provincial legislation outlines the ombudsman's power to obtain information, and to limitations to this power. Representative samples are taken from three provinces: British Columbia, New Brunswick and Nova Scotia.

"In British Columbia the Ombudsman may receive and obtain information from such persons and in such manner as he considers appropriate, and, in his discretion, may conduct hearings.

(2) Without restricting the generality of subsection (1), but subject to this Act, the Ombudsman may



- a) at any reasonable time enter and remain on premises occupied by an authority and may inspect all of the premises, converse in private with any person there and otherwise conduct an investigation respecting a matter within his jurisdiction,
- b) require a person to furnish information or to produce a document or thing in his possession or control that relates to an investigation at such time and place as he may specify whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of the authority,
- c) make copies of information furnished or document or thing produced under this section,
- d) summon before him and examine on oath any person who, in the opinion of the Ombudsman, is able to give information relevant to an investigation whether or not that person is a complainant or a member or employee of an authority, and for that purpose may administer an oath, and
- e) receive and accept, on oath or otherwise such evidence as he considers appropriate whether or not the evidence would be admissible in a court."

An example of limitations of power is given in the New Brunswick Act:

"Subject to subsection (5), where a person is bound by an Act to maintain secrecy in relation to, or not to disclose any matter, the Ombudsman shall not require that person to supply any information or to answer any question in relation to that matter or to produce any document or paper relating to the matter that would be a breach of the obligation of secrecy or non-disclosure.

With the prior consent in writing of the petitioner the Ombudsman may require a person to whom subsection (4) applies to supply information or answer questions or

produce documents or papers relating only to the petitioner and that person shall do so."

Nova Scotia provides another example:

"Where the Attorney General certifies that the giving of any information or the answering of any question or the production of any document or paper may disclose

- a) deliberations of the Executive Council;  
or
- b) activities of the Executive Council or any member of the Executive Council relating to matters of a secret or confidential nature and would be injurious to the public interest;

the Ombudsman shall not require the information or answer to be given or the document or paper produced.

(2) Subject to subsection (1), a rule of law that authorizes or requires the withholding of any document, paper or thing, or the refusal to answer any question on the ground that the disclosure of the document, paper or thing, or the answering of the question would be injurious to the public interest, does not apply in respect of any investigation by or proceedings before the Ombudsman"

9. Privileges of witnesses: provincial legislation outline privileges accorded individuals as seen in the Newfoundland legislation:

"Every person has the same privileges in relation to the giving of information, the answering of questions and the production of documents, papers and things under this Act as witnesses have in any court.

Except on the trial of a person for perjury, no statement made or answer given by that or any other person in the course of an inquiry by or any proceedings before the Commissioner is admissible in evidence against any person in any court or at any inquiry or in any other proceeding, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

No person is liable to prosecution for an offence against any Act by reason of his compliance with any requirement of the Commissioner under this section."

10. Complainant's right to be informed: provincial legislation provides that the complainant be informed of the state of his complaint. Quebec legislation is stated as an example:

"Whenever he refuses to make an investigation upon the application of a person, the Public Protector shall notify such person of his refusal, give him the reasons therefore and indicate to him what recourses, if any, he may exercise.

The Public Protector, when he has made an investigation upon the application of a person, shall inform the latter of the result of his investigation within a reasonable delay.

When the Public Protector is of the opinion on completion of an investigation, that justice has been done, he shall also give notice thereof to the head of the department of body concerned."

11. Report on investigation: provincial legislation requires the ombudsman to report on completion of an investigation on the course of action to be taken, e.g. the Manitoba Act states:

"Where, after making an investigation under this Act the Ombudsman is of opinion

- a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to have been
  - i) contrary to law, or
  - ii) unreasonable, or
  - iii) unjust, or
  - iv) oppressive, or
  - v) improperly discriminatory, or
  - vi) in accordance with a practice or procedure that is or may be reasonable, unjust, oppressive, or improperly discriminatory, or
  - vii) based wholly or partly on a mistake of law or fact, or
  - viii) wrong, or
- b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised



- i) for an improper purpose, or
  - ii) on irrelevant grounds, or
  - iii) on the taking into account of irrelevant considerations, or
- c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation;

the Ombudsman shall report his opinion and his reasons therefore to the appropriate Minister and to the department or agency of the government concerned, and may make such recommendations as he thinks fit.

Without limiting the generality of subsection (1), in making a report under subsection (1), the Ombudsman may recommend

- a) that a matter should be referred to the appropriate authority for further consideration; or
- b) that an omission should be rectified; or
- c) that a decision should be cancelled or varied; or
- d) that any practice on which a decision, recommendation, act or omission was based should be altered or reviewed; or
- e) that any law on which a decision, recommendation, act or omission was based should be reconsidered; or
- f) that reasons should be given for any decision, recommendation, act or omission; or
- g) that any other steps should be taken."

12. Right to be heard: provincial legislation provides the complainant with the right to be heard either personally or by counsel as seen in the following clause from the Ontario Act:

"If at any time during the course of an investigation, it appears to the Ombudsman that there may be sufficient grounds for his making any report or recommendation that may adversely affect any governmental organization or person, he shall give to that organization or person an opportunity to make representations respecting the adverse report or recommendation, either personally or by counsel."

13. Ombudsman report and follow-up action: provincial legislation gives the ombudsman measures to ensure that recommendations of his report are implemented as seen in the legislation from Alberta and New Brunswick:

"In Alberta the Ombudsman shall report his opinion and his reasons therefor to the appropriate Minister and to the department or agency concerned, and may make such recommendations as he thinks fit and in that case he may request the department or agency to notify him within a specified time of the steps, if any, that it proposes to take to give effect to his recommendations."

The New Brunswick legislation provides another example:

"Where, after the time stated under subsection (2), the department or agency does not act upon the recommendation of the Ombudsman, refuses to act thereon, or acts in a manner unsatisfactory to the Ombudsman, the Ombudsman may send a copy of his report and recommendation to the Lieutenant Governor in Council and may thereafter make a report to the Legislative Assembly.

The Ombudsman shall include with any report made under subsection (3) a copy of any comment made by the department or agency upon his opinion or recommendation."

14. Proceedings not subject to review: provincial legislation states that the ombudsman proceeding is not subject to review. Nova Scotia's legislation is given as an example:

"No proceeding of the Ombudsman is void for want of form and, except on the ground of lack of jurisdiction, no proceedings or decisions of the Ombudsman are to be challenged, reviewed, quashed or called in question of any court."

15. Immunity: provincial legislation outlines the ombudsman's privileges as seen in the Nova Scotia's Act:

"No proceedings lie against the Ombudsman or against any person holding any office or appointment under the Ombudsman for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act, unless it is shown he acted in bad faith.

The Ombudsman and any person holding any office or appointment under the Ombudsman shall not be called to give evidence in any court or in any proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of his functions under this Act."

Some provinces such as Newfoundland include an extra section in this clause:

"For the purposes of any Act or law respecting defamation, any report made by the Commissioner under this Act shall be deemed to be privileged and a fair and accurate report thereon in a newspaper or radio or television broadcast shall be deemed to be privileged."

16. Annual report: provincial legislation requires the ombudsman to produce an annual report. In some provinces, he may also produce reports of public interest.
17. Offences: provincial legislation contains clauses on offences as seen in the following Alberta Act:

"S.28 Any person who,

- a) without lawful justification or excuse, wilfully obstructs hinders or resists the Ombudsman or any other person in the exercise of his powers under the Act, or
- b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the Ombudsman or any other person under this Act, or
- c) wilfully makes any false statement to or misleads or attempts to mislead the Ombudsman or any other person in the exercise of his powers under this Act

is guilty of an offence and is liable on summary conviction to a fine of not more than \$500 and in default of payment to imprisonment for a term not exceeding three months."

18. Citizenship: Only three provinces: Saskatchewan, Alberta and Manitoba specify that the ombudsman should be a Canadian citizen.

#### B. Provincial Ombudsmen

Provincial information is presented in geographical order, from the west of Canada to the east.



## 1. British Columbia - The Ombudsman

### Role, duties and powers

The extension and concentration of government power over the lives and activities of citizens is one of the most pervasive tendencies in modern industrial societies. Large organized groups are usually well-equipped to pursue their interests and to protect their rights. However, many individuals and some groups often lack the resources of time and money to realize their interests or to protect their rights in the face of the complex mass of rules, regulations, programs and agencies which make up modern government. It can be an unequal struggle at every stage. The appointment of an ombudsman represents one of many efforts by the legislature to restore the balance. Ombudsmen use their powers of investigation and recommendation to strike a reasonable balance between the bureaucracy's general implementation of public policy and the citizen's legitimate expectation to be treated as an individual.

The ombudsman has immediate and long-range objectives: (1) Immediately and on a daily basis, the ombudsman will seek to rectify injustices he perceives after completing a thorough and fair investigation. (2) The long-range objective of the ombudsman must be to question and to seek to change those bureaucratic procedures and practices that repeatedly lead to errors and injustices.

The powers of the ombudsman to obtain information are set out in Section 15. They include the power to enter premises, require a person to furnish information or produce a document, summon and examine on oath any person who has relevant information.

### Method of appointment, provincial legislation, date of enforcement

Under section 2 of the Ombudsman Act, a special committee of the Legislative Assembly is required to recommend to the assembly that a person be appointed. The recommendation has to be unanimous. The recommendation is then presented to the Legislative Assembly for a vote and, if approved, is forwarded to the Lieutenant-Governor who makes the official appointment.

The appointment took effect on July 1, 1979, and two offices were opened to take complaints as of October 1, 1979.

### Protection of Human Rights: the Ombudsman's Role

The Act creates the ombudsman as an officer of the legislature, assisted in his work by a permanent investigative staff. The legislation empowers the ombudsman to receive and investigate citizens' complaints about official action by specified public authorities. When the complaint warrants inquiry or investigation, the ombudsman notifies the appropriate authority of his intention to investigate. Investigations aim at uncovering the relevant laws, regulations, policies, facts, and perceptions of all parties involved in the dispute. The ombudsman then makes the results of the investigation known to the authority and the complainant. If the investigation shows that an

authority's action, decision, procedure, or practice was essentially correct, fair and appropriate, the ombudsman explains that finding to the complainant and closes the matter.

Alternately, the ombudsman may, after investigating a complaint, recommend that an authority remedy an act, rectify a delay or omission, cancel a decision, alter a practice or procedure or suggest other steps as appropriate. The authority is not obliged to accept the ombudsman's recommendation. If an authority does not follow a recommendation, the ombudsman may submit a report of the matter to the Lieutenant Governor in Council and then may make such reports to the Legislative Assembly as he considers appropriate.

Although the above process, set out in the Ombudsman Act, is central to the role of the ombudsman, the ombudsman also has a more general mandate to suggest ways and means to make official procedures and policies more effective and to improve the quality of contact between the public service and the general public.

### Case Studies

The Ombudsman's Offices were not open in 1977 and 1978.

### General Information

The Ombudsman Act contains a schedule of eleven authorities the ombudsman has the power to investigate. Authorities in sections 1 and 2 of the schedule have come into force, which means that all ministries of the province and public corporations, commissions, boards and bureaux are subject to the provisions of the Ombudsman Act. The ombudsman may investigate any complaint in matters of administration involving these authorities. The other authorities contained in sections 3 to 11 of the schedule have not yet been proclaimed. They include universities, school boards, professional associations, local governments and hospitals.

The Ombudsman Act establishes a code of administrative justice for all public authorities. Official action (1) is expected to be in accordance with the law; (2) must not be unjust, oppressive, or improperly discriminatory; (3) must not be based on a mistake of law or fact and may not be based on irrelevant grounds or considerations; (4) must not be based on procedures that are arbitrary, unreasonable or unfair; (5) must not be based on statutory provisions, rules of law and practices that are unjust, oppressive or improperly discriminatory; (6) should occur only for a proper purpose; (7) must be accompanied by adequate and appropriate reasons to the citizen; (8) must not be negligent or improper; (9) must not cause unreasonable delay. This code of administrative justice is as broad as it is demanding.

## 2. Alberta - The Ombudsman

### Role, duties and powers

One of the most popularly accepted statements on the role and duty of an ombudsman is encompassed in the Reasons for Judgment of the Honourable The Chief Justice J.V.H. Milvain, Supreme Court of Alberta, in the matter of The Ombudsman Act. His Lordship observed:

"I am satisfied that the basic purpose of an Ombudsman is provision of a "watch-dog" designed to look into the entire workings of administrative laws ... the Ombudsman has no power of reversing any decision, or compelling an action or prohibition of any action. His function is to investigate and report, with the necessary recommendations ... the Ombudsman can bring to the Legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the Ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good."

The jurisdiction accorded the ombudsman in Alberta covers the workings of departments and agencies of the provincial government, as defined by The Ombudsman Act.

It should be noted that the role of the ombudsman is restricted to "matters of administration" as distinct from broad policy issues which are properly the role of the elected legislators to whom the ombudsman is ultimately responsible.

### Method of appointment, provincial legislation, date of enforcement

The enabling legislation for the Office in Alberta, The Ombudsman Act (R.S.A. 1970, ch. 268), came into operation on September 1, 1967. Pursuant to this Act, the ombudsman, an officer of the Legislative Assembly, is appointed by the Lieutenant Governor in Council on the recommendation of the assembly, for a term of five years. The ombudsman may be reappointed for further terms. Dr. Randall Ivany, the current incumbent, was first appointed effective May 1, 1974.



## The Protection of Human Rights: The Ombudsman's Role

Investigations may arise as the result of written complaints from individuals or groups adversely affected. The ombudsman may initiate investigations on his own motion. Finally, a Minister of the Crown may request the ombudsman to investigate a matter by way of a Ministerial Order.

To fulfill this mandate, the ombudsman is accorded broad powers of investigation. These include the power to demand the production of government files, save those of the Executive Council and pre-sentence reports, the power to subpoena witnesses, and to take testimony on oath. At the same time the ombudsman may, at the conclusion of an investigation, only make recommendations. The ombudsman is therefore a seeker of truth, and where the truth reveals inequity, an advocate for justice and redress.

The ultimate power of the ombudsman in Alberta, as is the case in many other jurisdictions, is the power to make a report public, either through the annual report or through a special report. In this manner the light of public scrutiny may be focussed on injustice.

### Case Studies

Recently, the Alberta Ombudsman issued a special report dealing with a centre for the detention and treatment of juveniles.

A series of articles had appeared in the news media detailing allegations regarding "abuse" of isolation rooms in the treatment of children at the centre.

Following a review of an internal government report on the allegations, the ombudsman initiated an investigation into the use of isolation rooms and related procedures, on his own motion. The investigation proved to be very complex. A large number of persons were interviewed, written materials reviewed, opinions sought from professionals in the field of child care, and comparable facilities elsewhere visited.

The 78-page report of the ombudsman contained more than thirty recommendations dealing with a broad range of issues including the use of isolation rooms, staffing patterns at the centre, facilities, placements of children, and medical facilities.

While supporting the program at the institution in general, the ombudsman sought to improve practices and procedures at the centre to enable it to fulfill its potential.

Since the report was issued, virtually all of the ombudsman's recommendations have been implemented by the government department responsible for the centre.

### General Information

1. The Office of the Ombudsman for the Province of Alberta was the first such office established in North America. Indeed, on his appointment as ombudsman, Dr. George B. McClellan was one of a mere handful of such officials throughout the world. Colleagues were to be found in six other focal points -- Sweden, Finland, Denmark, Norway, New Zealand, and Great Britain.

2. The First International Ombudsman Conference was held in Edmonton, Alberta, in 1976. Among other things, this meeting proved to be the genesis of the International Ombudsman Steering Committee, whose terms of reference initially dealt with proposals for the Second International Ombudsman Conference, which was held in Jerusalem, Israel, in 1980. Apart from the planning for that congress, the International Ombudsman Steering Committee was instrumental in establishing the International Ombudsman Institute at the Faculty of Law, University of Alberta, in Edmonton, in 1978. This institute serves as a focal point for research studies and the dissemination of information on the concept of ombudsmanship on an international scale. Since the institute's foundation, the International Ombudsman Steering Committee has been replaced by the Consultative Committee of Ombudsmen. Members of this council come from various regions of the world and are presently engaged in planning for the Third International Ombudsman Conference, tentatively scheduled to take place in 1984.

3. Amendments to the Ombudsman Act were given Royal Assent at the spring (1978) sitting of the Alberta Legislative Assembly. These amendments clarified certain areas of jurisdiction, enhanced the ombudsman's independence, provided a link with the assembly and enabled ministers to request investigations.

4. "Since becoming the Provincial Ombudsman for Alberta in May of 1974, I have become acutely aware that few people readily understand the function of the office. An attempt to offset this lack of knowledge amongst the general public has led me to the firm belief that the Ombudsman must make himself more readily available throughout the province." (Eleventh Annual Report of the Ombudsman, 1977)

### 3. Saskatchewan - The Ombudsman

#### Role, duties and powers

The role of the ombudsman is to make recommendations and regularly involves informing the public of general problems with particular government programs and policies.

The ombudsman is charged with investigating citizen complaints against its provincial government and possesses broad powers of investigation, including the right to summon witnesses and take evidence under oath. The ombudsman's jurisdiction extends to all agencies of the provincial government and as successive Saskatchewan governments have established agencies in traditional private sector areas such as utilities and resources, the Saskatchewan Ombudsman has a broad range of contact with the public.

Method of appointment, provincial legislation, date of enrolment

The ombudsman is appointed for a five-year term and as an officer of the legislature is appointed by resolution of the Legislative Assembly and subsequent Cabinet order. The independence of the Saskatchewan Ombudsman meets all the international tests including an annual obligation to report directly to the legislature of the Province of Saskatchewan.

The Saskatchewan Ombudsman was established pursuant to legislation enacted in 1972, described as:

An Act to provide for the appointment of a Person to Investigate Administrative decisions or acts of Departments of the Government and certain other Organizations and to define the Person's duties, functions and powers.

The Protection of Human Rights: the Ombudsman's Role

Before investigating any matter under this Act the ombudsman shall notify the deputy minister of the department or the administrative or executive head of the agency of the government affected, as the case may be, of his intention to make the investigation.

When the ombudsman believes that a complaint is justified, he may refer the matter to the minister in charge of the department or agency of the government. If it is not acted upon within a reasonable period, the ombudsman may submit a report of the matter, including a copy of the report containing the recommendations, to the Lieutenant Governor in Council and may therefore mention the report in his next annual report to the assembly.

Case Studies

Although the majority of the investigations conducted by the ombudsman do not directly involve specific articles of the Declaration of Human Rights, every year brings with it some of these issues. Many cases are investigated annually on the assistance being given to persons in need of social security and of complaints from inmates in provincial correctional centres.

1. In June of this year a complaint was lodged with my office, by a resident of Cumberland House, concerning his unsuccessful attempt to purchase the co-op store in Cumberland House. In addition, comments were and have been made concerning the issue of reverse or positive discrimination toward applicants for economic development loans. As our investigation received attention in the press and media, it was my opinion that the public interest would best be served by making public in summary form my findings and comments, particularly insofar as they relate to the issue of reverse or positive discrimination.



In April of 1978, the Registrar of Co-operative Associations, having conducted a review of the financial position of Northern Co-operative Trading Services Ltd., pursuant to section 123 of The Co-operative Associations Act, R.S.S. 1965, c. 246, concluded that the equity of the members of the co-op was impaired and accordingly, pursuant to subsection (1) of section 124 of that Act appointed an employee of the Department of Northern Saskatchewan (DNS) of La Ronge, Saskatchewan, as the administrator of Northern Co-operative Trading Services Ltd., in order to protect the equities of the members. The administrator officially assumed his duties on April 4, 1978. He, in accordance with the conditions of the Order-in-Council appointing him, was on loan to Northern Co-operative Trading Services Ltd. after that date and ceased all departmental duties. He subsequently moved to the offices of Northern Trading Co-operative Services Ltd., in La Ronge.

In addition to the administrator's appointment, an advisory committee was established by Order-in-Council pursuant to subsection (1) of section 5A of The Department of Co-operation and Co-operatives Act to assist the administrator of Northern Co-operative Trading Services Ltd. in his financial examination of the operations of Northern Co-operative Trading Services Ltd. The advisory committee's terms of reference were duly authorized by the Order-in-Council and the advisory committee included a representative from the Department of Co-operation, DNS, Federated Co-operatives Ltd., the Saskatchewan Co-operative Credit Society and two representatives from Northern Co-operative Trading Services Ltd.

This complaint arose from the subsequent decision of the administrator, acting upon the recommendation of the advisory committee, to offer for sale the assets of the co-op store in Cumberland House and the subsequent rejection of the complainant's bid for the property in question.

Prior to the date that the store was tendered for public bid, an appraisal of the property was conducted to give those persons responsible for the administration of the Northern Co-operative Trading Services Ltd., an idea of the worth of the assets of the Cumberland House store. Subsequent to that appraisal, tenders were placed in eight newspapers with a circulation in northern Saskatchewan. The advertisement contained, in addition to a description of the assets, a requirement that offers must be accompanied by a deposit of an amount not less than 5% of the tendered bid and that tenders were to be submitted to the administrator on or before 5:00 p.m. Central Standard Time, May 31, 1978.

On or about May 19, 1978, the complainant, through his solicitors, placed a bid with the administrator of Northern Co-operative Trading Services Ltd., for the Cumberland House property. The bid was conditional upon and subject to his obtaining a DNS guarantee of monies to be borrowed privately to complete the purchase. In addition, the bid was not accompanied by the deposit required by the conditions of the tender. Subsequently, a bid by another resident of Cumberland House was submitted to the administrator. The latter bid was accompanied by the required 5% deposit and was unconditional.

Our investigation confirmed that the complainant's bid was the larger of the two bids. The law states that a tender is an invitation to submit offers and unless there are specific words indicating that the sale will be to the highest bidder, it is not an offer to sell to the highest bidder. Accordingly, there was no obligation to accept the highest bid even if the complainant's bid had been unconditional and had been accompanied by the deposit required by the notice of tender. Given the conditional nature of the bid and the absence of a deposit, I could not find any fault whatsoever with the decision to reject his bid. Having considered the two bids and the conditional nature of the complainant's bid, I found it reasonable in the circumstances, that a decision was made to reject his bid. If the complainant's bid had been accepted and he had been unsuccessful in obtaining the necessary guarantee from DNS, Northern Co-operative Trading Services Ltd. could have lost valuable time in disposing of this asset by having to repeat the tendering process.

Similarly, I can find no fault or error in the acceptance of the competitor's bid as the bid conformed in all respects with the notice of tender. I should also emphasize that our investigation included the competitor's application for an economic development loan to finance the balance of the purchase price and also disclosed no improprieties by either the competitor or DNS in his successful loan application.

As indicated earlier, considerable publicity had been given to something called "reverse discrimination." It can also be seen that the issue is not a matter essential to our consideration of this complaint as the complainant's bid was properly rejected. However, given the publicity this issue had received, I felt that it was incumbent upon me to make some comment on this subject.

The problem as I understand it was that economic development loans limit or exclude persons other than those that could be described as "northerners." In this regard it should be noted that the limitation placed upon persons entitled to receive assistance under this program is not limited to persons of native ancestry but to northerners of whatever ancestry. The applicable section of the regulations reads as follows:

"Assistance may be provided to:

a) a person who:

- i) is a Canadian Citizen or has achieved landed immigrant status in Canada; and
- ii) has resided in the district for a period of fifteen years or half of his lifetime whichever is the lesser."

Accordingly, northern tenure rather than racial background is the criterion, even though, for reasons related to the population mix in the DNS area, more persons of Native ancestry than those of other backgrounds will qualify for assistance.

In addition, the regulations confer a discretion upon the minister whereby he may waive the residency requirements. In other words, an individual seeking a loan, who does not meet the residence requirements, is entitled to ask the minister to exercise his discretion and waive that requirement.

In the present circumstances the complainant submitted a bid conditional upon a DNS guarantee. He did not make a formal application for the guarantee. If he had applied, he may not have found it necessary to meet the residency requirements as clause (c) of subsection (1) of section 4 of the Economic Development regulations provides as follows:

"4. 1(c) Notwithstanding paragraph (a) assistance in the form of a guarantee may be given to any person residing in the district."

While there would be no certainty that the complainant would have qualified for the guarantee if he had applied, it is our opinion that his application would have been dealt with on its merits and that he would not have been barred or precluded merely because he had not lived in the district for fifteen years or half his lifetime.

Given the discretion contained in the regulations, I find it difficult to conclude that these provisions are discriminatory in either the usual sense of the word or within the meaning of that term in my legislation. One must realize that most legislation is enacted to recognize specific social and other needs and will affect the rights or interests of a segment rather than the whole of the provincial population. Where the legislature determines that, according to its perception of social needs, a specific program is necessary, it is entirely appropriate in my view to legislate in that field for the benefit of some rather than all. In my view, the program of economic development established to benefit northerners, of whatever ancestry, is legislation of a similar nature and not "discriminatory." There is no doubt that if I had found it necessary in this complaint to interpret the meaning of the term "improperly discriminatory" in subsection (1) of section 24 of my Act, I would have found that the residency requirements for economic development loans are not within the meaning of this term.

Accordingly, for the reasons set out above I found that these complaints respecting the complainant's unsuccessful bid for the co-op store in Cumberland House were not substantiated and closed our file.



2. In August of 1977, a complaint was received from two housekeeping aides at a general hospital. An "equal pay" complaint had been lodged with the Department of Labour in 1974 and they had progressed no further in the intervening three years. Implicit in their complaint was an allegation that the Department of Labour was not enforcing equal pay legislation in accordance with the provisions of the Act. The pay discrimination complained of related to a wage differential between female housekeeping aides and male caretakers. Our investigation confirmed that a complaint had been lodged in 1974 with the Department of Labour and that the department's investigation had concluded that a violation of the Act had indeed occurred. The department had more or less concluded their investigation in 1975, but it appeared activity on the file had then ceased.

Under the 1973 Labour Standards Act, the Department of Labour's director, when so advised by the Minister of Labour, or upon request from the complainant, was obligated to advise the Human Rights Commission of the matter and request a formal inquiry. It appeared from my investigation that the department had decided to approach the enforcement of equal pay legislation on a global rather than individual complaint basis. Apparently, an industry wide evaluation of hospital employees had occurred and the entitlement of the female employees would be determined through the collective bargaining process rather than under the Act. I was of the opinion this approach was not intended by the legislation. Accordingly, I found the complaint substantiated and outlined my concerns. I did not feel an individual's interests were best being served by a three year, or longer, collective bargaining process when the department was not complying with its own legislation.

Several of these problems were eliminated by new legislation proclaimed in 1977. However, the basic issue as to whether or not the provisions of the Labour Standards Act provide adequate recourse to collective bargaining and a global resolution to equal pay complaints was not resolved. General legislative recommendations were made to the Minister of Labour.

#### General Information

1. As an ombudsman has the right to base his recommendations on grounds other than just "legalities," he has an opportunity, rare in Canadian society, of identifying human rights issues and increasing the awareness of the public, the public service and elected officials to the practical application of these principles.

2. There were several occasions in 1978 where, even though a department or agency had faithfully complied with its legislative authority and administrative policies and procedures, the result created considerable hardship or difficulty for one or more individuals. In these situations a recommendation was made suggesting suitable amendments in order to cure present and future problems. Accordingly, amendments to



the superannuation legislation, property improvement grant program and the regulations under the medical care insurance commission are currently in various stages of the legislative process.

#### 4. Manitoba - The Ombudsman

##### Role, duties and powers

It is the duty of the ombudsman to investigate acts, decisions or omissions by departments or agencies of the provincial government concerning matters of administration whereby a person may be aggrieved.

Any person who feels aggrieved by any act, decision, omission or recommendation by a department or agency of the provincial government may request the ombudsman to investigate on his behalf.

The grievance must relate to a matter of administration, not to policy decisions taken by ... elected representatives.

If the complaint is within the jurisdiction of the ombudsman a thorough, impartial investigation will be carried out.

The traditional parliamentary (or legislative) ombudsman is impartial.

He has statutory powers to investigate - to recommend - to publicize.

Traditionally the ombudsman may also criticize or commend.

The ombudsman does not usurp the normal judicial process. He cannot impose penalties, he cannot order a government department to desist nor can he revoke any action taken.

But it is recognized that the ombudsman has strong persuasive powers which stem from the Ombudsman Act, and the respect which the office commands.

##### Method of appointment, provincial legislation, date of enforcement

The ombudsman is appointed by the Lieutenant Governor in Council (Cabinet) on the recommendation of a special committee of the Legislative Assembly. He is an officer of the legislature, independent of government, accountable to the legislature and submits his annual report to that body through the Speaker.

The Manitoba Ombudsman Act was passed during the 1969 fall session of the legislature. The first ombudsman was appointed April 1, 1970.

Unless he sooner resigns, dies or is removed from office, the ombudsman shall hold office for six years from the date of his appointment, and a person may be re-appointed for a second term of six years, but not for more than two terms of six years.

## The Protection of Human Rights: the Ombudsman's Role

The complaint will first be tested for jurisdiction. Once this is established the relevant facts and law will be studied. The department or agency of government is notified of the complaint and requested to state its position.

Although most investigations are conducted informally, the ombudsman has statutory power to summon witnesses before him and to take evidence on oath. The ombudsman may enter government premises and require the production of documents relative to his investigation.

When all the facts and law have been considered, the ombudsman will determine whether or not the complaint is justified and what corrective action to recommend. Usually the ombudsman's recommendation is accepted. Whatever the decision may be, the complainant is notified of the result of the investigation.

When the investigation is completed, if, in the judgement of the ombudsman, the complaint is found to be valid he may recommend corrective action to bring about redress of grievance and to prevent a recurrence.

Because of his dual responsibility to the legislature and to people on behalf of whom he conducts investigations it will be seen that the ombudsman is in fact fulfilling the definition of his title. He is accountable to the legislature and represents people who are aggrieved.

### Case Studies

1. This matter was brought to my attention by a lawyer on behalf of a client, for whom he had acted in a civil damages action in the courts following a motor vehicle accident in 1974 in which the client had sustained injuries.

The court action had been commenced against the driver of the other vehicle involved in the accident, and who was being represented by a lawyer from the Manitoba Public Insurance Corporation as the insurers of the defendant driver.

An examination for discovery was held in the court during September 1975 in the course of which my complainant and his lawyer were surprised to learn that counsel for Manitoba Public Insurance Corporation (MPIC) was in possession of detailed information on the medical history of my complainant prior to the accident of 1974. This became evident from the questions concerning his medical history before the accident that were put to my complainant by the Manitoba Public Insurance Corporation Counsel.

Such medical history could only have been obtained from either my complainant himself, his private medical doctor, or The Manitoba Health Services Commission.

Since neither my complainant nor his doctor had given the information to Manitoba Public Insurance Corporation, the corporation must have obtained the information, either directly or indirectly, from The Manitoba Health Services Commission.

My initial enquiries were directed to the Manitoba Public Insurance Corporation and I was advised by general counsel for the Manitoba Public Insurance Corporation that from time to time, when necessary, the corporation engages private investigators to carry out investigations on matters relevant to issues raised in litigation against the corporation or its insured. My attention was drawn to section 35(1) of Manitoba Regulation 333/74 which makes it mandatory for the corporation, where a claim for damages has been made against an insured, to defend the insured and to assist the insured by causing investigations to be made regarding a claim for damages.

In this instance the Manitoba Public Insurance Corporation had retained the services of a private investigator to conduct such investigations. The letter from Manitoba Public Insurance Corporation, Portage La Prairie, confirming the required investigation referred to an "activities check and surveillance of" the insured.

Although the above-quoted regulation places an onus on Manitoba Public Insurance Corporation to investigate a claim, the obtaining of the medical records of a person is specifically referred to in section 46 of the Manitoba Public Insurance Corporation Act which reads:

"Every duly qualified medical practitioner, chiropractor as defined in The Chiropractic Act; dentist as defined in The Dental Association Act, and the employees of every hospital as defined in The Hospitals Act attending to, diagnosing, treating, or being consulted by any person injured in a motor vehicle accident in Manitoba shall, whenever requested by the Corporation, forthwith furnish to it a report of the injuries, and the diagnosis and treatment thereof, in such form as the Corporation may prescribe."

This section makes it patently clear that the Manitoba Public Insurance Corporation is lawfully entitled to obtain medical information regarding the injuries sustained in a particular motor vehicle accident to which a specific claim refers. However, there is no provision for Manitoba Public Insurance Corporation to obtain details of medical history of the person prior to the traffic accident. Neither does the section make any reference to Manitoba Health Services Commission being required to furnish reports to the Manitoba Public Insurance Corporation.

A statutory restriction is placed on the Manitoba Health Services Commission on the release of medical information and is referred to in section 109(1) of The Health Services Insurance Act which reads as follows:

"Disclosure of information.



109(1) Information obtained by, or furnished to, the Commission or the medical review committee, and relating to or respecting

- (A) The relationship of a medical practitioner to a patient; or
- (B) the medical services rendered by a medical practitioner to a patient; shall not be communicated to any person not legally entitled thereto."

Since the Manitoba Public Insurance Commission is legally entitled to obtain medical information regarding the injuries, diagnosis and treatment of same sustained in a traffic accident then that information may be supplied by The Manitoba Health Services Commission.

The only legal way by which my complainant's previous medical history could be released would be by subpoena in connection with a court hearing or from the insured's doctor with the insured's consent. This was not done in this case.

My enquiries took me to the Portage La Prairie office of the Manitoba Public Insurance Corporation where I examined the complete file pertaining to my complainant. Contained in the file was a comprehensive report from the private investigator to the Claims Adjustor, Manitoba Public Insurance Commission, Portage La Prairie, which included a detailed record of my complainant's medical history prior to the accident. Comparison of the report with an excerpt from the transcript of the Examination for Discovery showed that questions asked of my complainant regarding his medical history had obviously been based on the information contained in the private investigator's report to the Manitoba Public Insurance Commission. Further correspondence on file from the investigator made reference to his "contact" at MHSC.

My subsequent enquiries at Manitoba Health Services Commission established that the investigator's "contact" was a junior employee in the Third Party Liability Section of the Manitoba Health Services Commission. In discussing the matter of release of medical information, and the confidentiality required of employees, with senior staff members of Manitoba Health Services Commission, it was learned that a memo had been issued to senior staff by the Chairman in May of 1971 drawing attention to the Oath of Office (which all employees make at time of appointment) and re-affirming policy under which certain information may be released. A further memo was issued in January 1973 by the Executive Director to all staff and dealing with confidentiality and security of commission information.

The employee, referred to as the "contact" by the investigator, was interviewed and made a statutory declaration in which she stated that she had been introduced to the private investigator by her former supervisor who has since left the Manitoba Health Services Commission. Her supervisor had told her that if this investigator or his partner required information it was quite all right to give him the information he wanted since he worked "hand in hand" with Autopac. She further said that she had supplied the medical history of my complainant to the investigator at his request.



I later interviewed the employee's former supervisor who confirmed that junior staff did give out information concerning registrants with the commission but that this information was mainly confined to addresses and confirmation that claims had been made by that particular person.

There is little doubt that if the instructions contained in the two previously mentioned memos had been made more widely known among the junior staff, this complaint would never have been made.

When the present supervisor of the section became aware, in September 1975, that information from the records was being given out by junior members of staff, immediate orders were issued that no further information was to be given out by junior staff and that requests for information were to be referred to the supervisor or a senior employee of the section. This practice is still in effect and has stopped the unauthorized release of medical information.

As everyone knows, a person's medical history is a matter which for obvious reasons is held in strict confidence by his or her doctor. However, in order to obtain payment for his services, the doctor has to supply a report to The Manitoba Health Services Commission. The commission, therefore, has become the repository of a vast amount of confidential medical information and the prevention of leakage of this information is a matter of great concern to executive and staff of Manitoba Health Services Commission.

There was no requirement for any recommendation by the ombudsman since steps had already been taken by the claims supervisor to prevent any recurrence. Additionally, further instructions have now been issued to all staff on the matter of confidentiality in their work.

The junior employee who released the medical information to the private investigator should not be faulted. There had been a lack of clear direction from senior staff down to junior staff as to what information should be given out and to whom. In her statutory declaration the employee stated in part:

"Because of the practice that had prevailed when I came into the section and because (the private investigator) was well known with the department and I knew he was working on claims for Autopac I didn't feel that I was doing anything wrong. It was not until Mrs. Jackson took over as supervisor of third party liability that myself and the other girls were told that we were not to give out any information to anyone...."

I did not think it fair that this truthful, young, junior employee should be made a "scapegoat" and I urged the assistant executive director not to be severe so far as any disciplinary action was concerned. I am pleased to say the assistant executive director heeded my urging.

It must be remembered that this leak took place in February 1975. It was drawn to my attention February 1977. The leak at the Manitoba Health Services Commission has now been plugged and probably had been since September 1975. In any event a firm and clear directive was issued by the assistant executive director pertaining to the release of information, that being as a result of this investigation. The directive was addressed to all Manitoba Health Services Commission staff. On this basis the cause of the complaint was "rectified."

So far as the Manitoba Public Insurance Commission is concerned, the general manager states that when private investigators are engaged to carry out investigations in defence of the Corporation's insureds these agencies are independent contractors and do not operate under the direction or control of the corporation. General counsel for the corporation said the methods used by or the source available to the investigators in accumulating the required information was beyond his knowledge. That may be so. But the source of the medical information in this case must have been perfectly obvious to the claims adjustor at the Manitoba Public Insurance Commission Office, Portage La Prairie and to legal counsel who was seized of the claim file at that time. Both must have been aware that the means employed to obtain medical information was wrong.

If the information required by the corporation in defending a claim is obtainable by legitimate means there should be no need to retain a private investigator to carry out "activities checks and surveillance" of insured persons.

## 5. Ontario - The Ombudsman

### Role, duties and powers

The function of the ombudsman, as set forth in The Ombudsman Act, 1975, is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his or its personal capacity.

The ombudsman may make any such investigation either on a complaint made to him by any person affected, or of his own motion. In order that the effectiveness of the ombudsman is ensured he has been granted broad powers to compel the giving of evidence, to enter upon any premises occupied by a governmental organization and to delegate his powers to persons holding office under him.

The Ombudsman Act does not give the ombudsman jurisdiction to investigate a complaint where the law has provided a right of hearing, objection, appeal or review until after the time for hearing, etc., has expired or the appropriate processes have been exhausted.

### Method of appointment, provincial legislation, date of enforcement

Ontario adopted the Office of the Ombudsman in the spring of 1975 with the passing of Bill 86 - an Act to provide for an ombudsman to invest-

igate administrative decisions and acts of officials of the Government of Ontario and its agencies.

The Ontario Ombudsman is a parliamentary type ombudsman on the New Zealand model, appointed by the Cabinet on the address of the legislative assembly as an officer of the legislature and completely independent of the executive branch of government.

According to Bill 86:

Subject to this Act, the Ombudsman shall hold office for a term of ten years, but is removable at any time for cause by the Lieutenant-Governor in Council on the address of the Assembly. The Ombudsman may be reappointed for a further term or terms but shall retire upon attaining the age of sixty-five years.

#### The Protection of Human Rights: the Ombudsman's Role

Before investigating any matter the ombudsman is required to inform the head of the governmental organization affected of his intention to investigate and the investigation is conducted in private to guarantee confidentiality.

Before making any report or recommendation which may adversely affect any governmental organization or person the ombudsman must afford to such organization or person an opportunity to respond to his proposed adverse report. Similarly the ombudsman adheres to the principle of "administrative fairness" whereby the complainant is given an opportunity to respond to the case made against him by the governmental organization. This involves notifying complainants of the important facts, policies and law on which the governmental organization bases its position.

Following investigation, the ombudsman may recommend to the governmental organization appropriate remedial action including reconsideration of decisions, rectification of omissions, alterations of practices, reconsideration of existing laws and generally anything which will lead to fair, just and responsive administration.

A copy of the ombudsman's report and recommendations is also submitted to the minister concerned, and at the ombudsman's discretion, to the Premier and the legislative assembly.

When the ombudsman makes a recommendation after any investigation and no appropriate action has been taken within a reasonable time by the governmental organization concerned, he must inform the complainant of his recommendation and may make comments as he thinks fit. After any investigation, he must inform the complainant of the result of the investigation.

The ombudsman does not have the right to review decisions of judges or Executive Council (Cabinet), the functions of any court of law or the actions of any person acting as legal adviser or counsel to the Crown.



## Case Studies

1. The complainant, a 44-year-old, blind physiotherapist from a Western Ontario city, contacted our office with a complaint against the Ministry of Health.

The complainant, a licenced and practicing physiotherapist for the past twenty-two years, advised us that he had applied annually since 1967 to the Ontario Health Insurance Plan (OHIP) for insured coverage of his physiotherapy clinic. He indicated that his application had been consistently denied by the ministry on the ground that OHIP coverage was closed to all physiotherapy practices except those in "under-serviced areas," such as the remote areas of the province.

The complainant felt that the ministry should consider approval of applications to operate private physiotherapy practices under OHIP from totally blind physiotherapists who are native to Ontario. He felt that it was becoming increasingly difficult for blind physiotherapists to compete with sighted staff in most hospital settings and for them to realize their professional potential and opportunities for advancement.

It was also the complainant's contention that a small private practice allows a blind physiotherapist to control his working environment and to function more efficiently. He had operated a private physiotherapy practice in a western Ontario city, without the benefit of OHIP coverage for the last nine years. As this was his only employment, he felt that his record demonstrated both the acceptance of the medical profession and the community.

The ministry's position was that problems could arise from treating the complainant any differently from other physiotherapists and that on the basis of relative need, the city in which the complainant practised physiotherapy was not a locality in which the ministry would choose to aid a private physiotherapy facility at present because, according to ministry statistics, the city was "adequately serviced."

During our investigation, we were advised that there were nineteen blind physiotherapists licenced to practice in Ontario. Thirteen of them were employed in hospitals for which their services are billed through OHIP - two other physiotherapists worked in hospitals in addition to working in OHIP "approved facilities" under the Health Insurance Act. The one blind physiotherapist who had been operating his own clinic for nine years without any assistance from OHIP was the complainant.

Prior to reaching any final conclusions, we again approached the ministry with the above information to inquire as to whether it would be prepared to reconsider the complainant's application. The ministry did not wish to do so.

We then submitted our final report to the deputy minister in which we indicated that we were of the opinion that the complainant's case was exceptional and unique and deserved to be judged on its own merits despite the ministry's concern about making exceptions.



It was our recommendation that the blind physiotherapist should have his application approved for OHIP coverage under Part I, Schedule 9, of The Health Insurance Act as soon as possible.

The deputy minister subsequently responded to our recommendation and stated that, having reviewed the special circumstances of the complainant's case and also having regard to the consequences of making an exception, he was prepared to approve the complainant's case under The Health Insurance Act if the complainant would be prepared to relocate and set up a physiotherapy practice in any one of five communities listed by the ministry which, according to its statistics, required physiotherapy services.

Upon advising the complainant of the ministry's suggested compromise, we were still of the opinion that this was an exceptional and unique case and that it would be unreasonable to require him to relocate both his home and his office in order to obtain "approved facility" status.

We subsequently responded to the deputy minister's proposal indicating that we were still of the view that our original recommendation was in order and we again recommended that the ministry grant the complainant approval for OHIP coverage for his physiotherapy practice.

The deputy minister subsequently replied and stated that the necessary steps would be taken to have the complainant's physiotherapy practice listed as an "approved facility," this being a satisfactory resolution to the complainant's request that his application be judged on its own particular merits.

Upon the conclusion of this matter, we forwarded our final report and the ministry's final response to the complainant, who subsequently expressed his appreciation and stated that ministry officials had recently visited his office and that his practice would be listed as an "approved facility" on January 1, 1978.

2. The allegation of ten French-speaking inmates in a detention centre who said discrimination existed against francophone inmates, contended that there was a delay in processing inmate requests submitted in the French language; that some inmates experienced difficulties in communicating with correctional officers; that there was an inadequate amount of French reading material available; that the centre's institutional rules and regulations were posted in English only; that signs and posters in the centre were not bilingual and that conflicts arose between English- and French-speaking inmates over the selection of television programs. Our investigator spoke with eight of the inmates and senior detention centre officials, as well as several correctional officers. We found that there was an adequate number of bilingual staff members to meet the requirements of the French-speaking inmates and encountered no unwillingness on the staff's part to converse in the French language. Requests from francophone inmates were always dealt with, but our investigator found that the speed with which they were handled depended on which correctional officer received the request. The question of television programs was being handled among the inmates themselves, but a problem arose in obtaining

French-language copies of the Criminal Code. The Office of the Ombudsman made two copies of the code available to the centre for inmate use and the ministry issued instructions that two copies of the code in the French language were to be made available in all institutions. The superintendent of the centre informed our investigator that he was in the process of converting interior signs to French, but because of administrative delay in obtaining translations, the Office of the Ombudsman offered its translation services to the centre. This proposal was accepted and the centre was soon equipped with institutional rules and regulations as well as signs for visitors in French. Other institutional signs were prepared by the superintendent's staff in French and, as a result of our investigation, the ombudsman concluded that the centre's personnel were doing their utmost to ensure the linguistic rights of all inmates.

### General Information

1. Within the relatively short span of the last five years the evaluation of the role of the ombudsman in the protection of human rights is positive without qualification.

2. The ombudsman's role as a protector of human rights is a profoundly democratic institution. As Dr. I.E. Nebenzahl, Israel's Commissioner for Complaints from the Public (Ombudsman) has stated:

"With the right complaint, the individual citizen is given a means of directly influencing the administration, more specifically and, in its own time and place, more powerfully, than by casting his vote as one of many in an election. This element of direct democracy may account for some of the appeal of the Ombudsman idea."

3. As with all previous reports, northern Ontario had the highest complaint-to-population ratio, as well as the single largest volume of complaints from our nine regions.

### 6. Québec - The Public Protector

#### Role, duties and powers

The Public Protector is an agent of the National Assembly with the responsibility of conducting an investigation at the request of any person who feels that he has been wronged by an administrative act of an official of the provincial government or one of its departments, or by the procedure followed by a government body in the exercise of a quasi-judicial function. The Public Protector serves the people of Québec and fills a need which grows commensurately with the complexity of the apparatus of government.

In order to discharge his responsibilities properly, the Public Protector has access to any files, may consult any documents and interrogate any officials. He does not, however, have any power to make decisions: far from making his actions ineffective, this constitutes an element of strength, for, while officials would be reticent with an official investigator who had the authority to assess their actions from the outside, or to take over their functions from them, they have no difficulty in accepting the office of a Public Protector who dictates nothing, but makes recommendations with as absolute an impartiality as is humanly possible to achieve.

The actions of the Public Protector with regard to the protection of the rights of the individual are carried out, "at source", in other words by monitoring the agencies whose responsibility it is to respect those rights.

#### Method of appointment, provincial legislation, date of enforcement

On November 14, 1968, Québec acquired a Public Protector (Public Protector Act, R.S.Q. ch. P-32).

The Public Protector is appointed on the recommendation of the Prime Minister (of Québec), with the approval of two-thirds of the members of the National Assembly: he is absolutely above politics. He can be dismissed only by a resolution of the National Assembly, which also requires the approval of two-thirds of the members. His term of office is five years and may be renewed.

#### The Protection of Human Rights: the Public Protector's Role

If the Public Protector is of the opinion that the appropriate measures have not been taken within a reasonable period to give effect to one of his recommendations, or if, on completion of an investigation, he is of the opinion that a person has suffered an injustice by reason of the tenor of a law or regulation, he may make a special report to the National Assembly or advise the government. He has hitherto never had to use such methods to achieve the desired results.

#### Case Studies

When the Public Protector requires quasi-judicial bodies to follow procedures based on the most elementary principles of natural justice, he is defending the fundamental rights of Quebecers as recognized by the constitution. When the Public Protector intervenes to insist that prison inmates be treated in a humane and not in an arbitrary manner, he is defending the right to liberty. When the Public Protector demands that the welfare regulations be applied less rigidly, he is defending the right to social security. When the Public Protector conducts discussions with the Workmen's Compensation Board so that officials are aware of the desirability of cutting down delays in processing claims and applying conscientiously all the rules of compensation that favour those injured at work, he is defending the



right to fair working conditions. When the Public Protector monitors the way in which the Minimum Wage Commission follows up claims for unpaid vacation or wages, he is defending the right to remuneration and to reasonable limitation of the hours of work. When the Public Protector submits observations to the Health Insurance Plan, he is defending, albeit indirectly, the right to medical care.

In 1977, the characteristic action of the Public Protector in protecting the rights of the individual was reflected in the area of prison reform. It concerned the inmates' knowledge of the internal regulations of the prison and specifically of the directive concerning the procedure of the disciplinary committees. The Public Protector also recommended to the Minister of Justice a legal review and a new consolidation of the existing provisions of the legislation and the regulations.

This recommendation was implemented during 1978 and led to the adoption of a regulation, sections 2 and 6 of which reflect its underlying humanitarian philosophy:

2. In addition to the powers conferred upon him by the Act and this regulation, the director general may exercise the following powers:

a) take the necessary steps to ensure that, in each establishment, the Act and this regulation are applied impartially, with due respect for the human dignity of the inmate and without distinction, exclusion or preference based on race, colour, sex, sexual orientation, civil status, religion, political conviction, language, ethnic or national origin, social status or the fact that the individual is handicapped or uses some means to overcome his handicap;

6. Officials shall perform their duties with respect for those imprisoned and in accordance with the following principles and standards:

a) the deprivation of liberty resulting from imprisonment and the punishments ordered by the disciplinary committee are the only restraints to which the person imprisoned may be subjected.

## 7. New Brunswick - The Ombudsman

### Role, duties and powers

The ombudsman is appointed by the legislative assembly to investigate complaints against administrative decisions and acts of officials of the Government of New Brunswick and any of its agencies or organizations and those of any municipality of the province.

His office has an indirect, yet concrete influence in the role of human rights in the province.

The investigative powers of the ombudsman are very broad. However, he may, at his discretion refuse to investigate a grievance if he considers it to be trivial or frivolous, if the petitioner had had knowledge of the act or omission for more than one year before petitioning, or if the petitioner does not have a sufficient personal interest in the subject matter of the grievance or if upon a balance of convenience between the public interest and the person aggrieved, the ombudsman is of the opinion that the grievance should not be investigated.

The ombudsman has no authority to investigate complaints against the federal government, the courts, the Cabinet, private companies and individuals, and any complaint where there is a right of appeal or review until such right has been exercised or the time for making such an appeal has expired. If a complaint is not within jurisdiction, the ombudsman may in some instances be able to offer help or assistance.

The Ombudsman Act is consistent with the United Nations declaration and validates the principles outlined in it by assuring the people of New Brunswick that any deficiencies (in governmental administration) will be corrected by the use of fair and equitable administrative procedures.

The ombudsman assumes a "middleman" position until such time as he determines that a grievance is justified. However, once a grievance is determined to be justified, the ombudsman will use all the resources at his command to rectify the matter.

Method of appointment, provincial legislation, date of enforcement

The New Brunswick Ombudsman's Office was created by legislation passed in 1967.

The office was created to enable a means of retaining the close interpersonal relationship between citizen and government in the face of a growing bureaucracy.

The ombudsman is appointed by the Lieutenant-Governor in Council on the recommendation of the legislative assembly. He holds office for ten years and is eligible to be reappointed. The ombudsman is given the status of a Supreme Court judge yet is not answerable to the courts except insofar as he may wish to refer to a court for an interpretation of his legislation. He is only answerable to the legislature which appointed him. Though the ombudsman's recommendations are not binding, they are almost invariably acceded to.

Upon his appointment, the ombudsman takes an oath administered by the Clerk of the Legislative Assembly, that he will faithfully and impartially perform the duties of his office. He is not permitted to hold any office of trust or profit other than his office as ombudsman nor

engage in any occupation for reward outside the duties of his office without prior approval in each particular case by the legislative assembly. He also swears not to divulge any information received by him under the Ombudsman Act except for the purpose of giving effect to the Act.

#### The Protection of Human Rights: The Ombudsman's Role

If the ombudsman decides to investigate a grievance, he must inform the head of the department or agency administering the law of the province or of a municipality of his intention to investigate. After advising the appropriate department or agency heads, the ombudsman may interview such persons and examine written documentation relevant to the grievance.

The investigative powers of the ombudsman extend to administering oaths and examining under oath any officer of a department or agency who is able to give information. He may summon any government official, the petitioner, and (with the leave of the Attorney General), other private citizens to formal hearings.

The flexibility of the Ombudsman's Office is protected by the requirement that:

- a) all investigations be conducted in private;
- b) his hearings are not subject to the normal rules of evidence;
- c) except on jurisdictional grounds, his actions may not be reviewed by the courts.

After investigation, if the ombudsman is of the opinion that a grievance may exist, he reports his opinion and any recommendations to the administrative head of the department. He may then request the department or agency, within a specified time, to notify him of the steps it proposes to take to give effect to his recommendation.

Should the appropriate person in the department or agency fail to act upon the recommendation, the ombudsman may forward his recommendation to the Cabinet and make a report to the legislative assembly.

It is to be stressed that there is no strict legal obligation for any of the parties to implement the recommendations of the ombudsman. Instead he must rely on two factors to see his recommendations through. The first is logic and moral suasion. Combined with this is the right of the ombudsman to make his report public.

#### Case Studies

Examples of the protection of human rights are provided below:

1. Article 5 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.



On May 16, 1978, the Ombudsman's Office had an opportunity to attend a provincial jail to receive inmate grievances. Twenty-seven prisoners, (nearly a third of the total number of inmates) lodged forty complaints with the office. The complaints ranged from factors affecting the day-to-day lives of the jail inmates (including their rights to temporary absence programs), the quality of medical care, the level of hygiene at the institution, the use of solitary confinement and other in-house punishment, the quality of recreational facilities, to complaints which were related to other departments or agencies of the government.

It was apparent that the hopelessly inadequate physical condition of the prison justified a number of complaints. Further contact with the department in question, ensured a partial or total rectification of the complaints made.

Based on this experience, the office subsequently visited other New Brunswick jails.

2. Article 17 - Everyone has the right to own property alone as well as in association with others.

No one shall arbitrarily be deprived of his property.

The complainant grieved with respect to the allegedly improper tax sale of property owned by her 13-year-old son. At the date the complainant contacted the Ombudsman's Office, the property in question had been sold and the redemption period established under the Real Property Tax Act had nearly expired.

Investigation by the office subsequently discovered that:

1. The complainant's family had been on social assistance for a number of years and the property was owned by a 13-year-old boy.
2. No notice of arrears had been sent to the complainant for a period of one year prior to the tax sale.
3. The boy's father, to whom official correspondence had been directed, was a person with limited intelligence or understanding.
4. The mother of the boy - the complainant - who was separated from the father, had received no notice of the sale whatsoever although she had consistently paid taxes on the property.
5. The family water supply was located on the subject property and would have been lost to the family had the complainant not redeemed the property.

A recommendation was acceded to by the department, that a full refund of the complainant's expenses arising out of the tax sale be made to her.

3. Article 25 - Everyone has the right to a standard of living adequate for the health and well being of himself and all of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Ombudsman's Office received many complaints concerning the level of assistance received by social welfare clients and the department's refusal of applications for social assistance.

The office refers more than fifty families a year to the appeal system established under the Social Welfare Act and has found the system to be adequate and fair. In fact, the present Social Welfare Appeals Board was brought into existence following a recommendation from the ombudsman in 1969.

However, complaints were received that the Social Welfare Appeals Board was not following the procedure laid down in the regulations. Specifically, it was alleged that the board was not giving written reasons for its decisions, that all three members of a given Appeals Board were not signing the decision and that decisions were not being forwarded to the appellant.

On review with the department, it was found that the complaints were justified. After discussion and study, the Appeals Board agreed to comply to its regulations.

#### General Information

1. In 1976, New Brunswick amended its Ombudsman Act to extend the jurisdiction of the ombudsman to municipalities.

2. According to a statement made in his Eleventh Annual report (1977) the ombudsman believes in publicizing his position:

I believe that an available service which is not known to the general public cannot be called a useful service. I therefore intend to publicize the services provided by the Office of the Ombudsman inasmuch as our means permit. One function of the ombudsman is to attract complaints.

3. "On January 1, 1980, the Office assumed an expanded jurisdiction as an appeal mechanism under the Right to Information Act. Section 7 of the Act confers on any citizen refused information by a Minister the right to refer the matter to the Ombudsman. The Ombudsman reviews the matter by inspecting the information and by investigating the circumstances leading to its creation and subsequent exclusion from the citizen. At the conclusion of his review, the Ombudsman recommends

that the Minister either release or not release the information. The Minister, like the deputy minister, under the Ombudsman Act, may accept or reject the Ombudsman's recommendation. The Ombudsman's role under this Act is consistent with and complementary to the traditional role of the Office."

## 8. Nova Scotia - The Ombudsman

### Role, duties and powers

The ombudsman has wide powers of investigation. He has access to provincial and municipal files, but not those of Cabinet ministers or judges. He has no power in the field of policy or decision-making, which remains in the hands of legislators in our parliamentary democratic system of government.

From the outset, in Nova Scotia, the ombudsman was empowered to investigate alleged maladministration in both the municipal and provincial spheres. It was the first province to embrace the municipal jurisdiction.

### Method of appointment, provincial legislation, date of enforcement

An Act to establish the Office of Ombudsman in the Province of Nova Scotia was assented to on December 18, 1970. The first ombudsman was appointed April 27, 1971.

The ombudsman is appointed by the Governor in Council for a term of five years, with eligibility for reappointment.

### The Protection of Human Rights: The Ombudsman's Role

Where the ombudsman intends to investigate a grievance under this Act he shall:

- a) in the case of a grievance relating to a department, notify the minister and the chief officer of the department;
- b) in the case of a grievance relating to a municipal unit, notify the chief officer of the municipal unit.

If the ombudsman believes that the complaint is justified, he refers the matter to the above-mentioned authorities. If he feels that the matter has not been handled in a satisfactory manner, he may then send a copy of his report and recommendations to the Governor in Council and to the House of Assembly.

### Case Studies

A university student, writing on behalf of an association of international students, alleged that an injustice was being imposed by the province through what was termed "different treatment" of foreigners,



in that the latter were allegedly being excluded from the benefits of Medical Services Insurance (MSI).

The complainant went on to speak of Canada's international commitments toward foreign students, our country's promise of continuing technological assistance through the United Nations, and so forth.

The Office of the Ombudsman wrote to the medical director of MSI to learn the facts, and to seek assistance in responding to the problem over which the foreign spokesman was apparently so upset.

The applicable section of the Health Services and Insurance Act, under Hospital Insurance Regulations, drew attention to the key word "resident," which seemed to be vital to this particular case. A "resident" means a person who is legally entitled to remain in Canada, and who makes his home and is normally present in Nova Scotia, but does not include a tourist, a transient or a visitor to Nova Scotia.

The Committee of Eligibility and Third Party Liability applied the guideline to persons coming to Nova Scotia from outside Canada, ensuring that only permanent residents are eligible for MSI, and Hospital Insurance Benefits. The Committee had agreed that coverage would be granted to: 1) Returning Canadians 2) Landed immigrants 3) Persons with a Ministerial Permit, and 4) Persons with a Record of Report, applying for immigrant status, but a student does not fall into any of these categories.

While the decision of the Committee on Eligibility and Third Party Liability affects most foreign students, it was pointed out that students from other Canadian provinces who attend universities in Nova Scotia are also not eligible for MSI benefits: therefore, one cannot support the allegation that foreign students are being treated differently.

In the case under study the Office of the Ombudsman could find no evidence of maladministration of the laws of the province. The complainant was advised, however, that if he felt that he was being discriminated against, on the basis of race or colour, he should contact the Nova Scotia Human Rights Commission. Finally, if the complainant was of the opinion that the law in this case was a bad one, he was shown the avenue of writing to a Member of the Legislative Assembly, in particular the Minister of Health.

In conclusion, it was impressed upon the complainant that the decision as to eligibility does not rest with the person's activity in the province (student or other), nor upon the person's nationality. It rests solely on the word "resident," under the Act and the regulations.

Comments relating to Canada's commitments were, of course, irrelevant, especially since health services are a provincial matter. The ombudsman did not close the file until the matter was completely aired with his own legal counsel and with that of the Health Services and Insurance Commission. The file was closed as "information given."

## 9. Newfoundland - The Parliamentary Commissioner

### Role, duties and powers

The role and duties of the Ombudsman or Parliamentary Commissioner which is the official title of the office, may best be described as stated in the introduction of the Report of the Select Committee of the House of Assembly of Newfoundland on the appointment of an ombudsman.

"An Ombudsman is an officer of the state whose task it is to investigate alleged injustices to citizens caused by the rigidity of legislation or administration, bureaucratic indifference or inefficiency, or a miscarriage of justice through incompetence, arrogance, or persecution by public officials. He is not all-powerful: that is, he does not dictate to the state. Rather he is charged with the enforcement of citizen's rights under the law that may be infringed upon either accidentally or deliberately by the inexorable and necessarily impersonal turning of the giant wheels of public administration."

In order that an ombudsman's office might function satisfactorily, it must be headed by a person of high educational knowledge of administrative procedures. He should also have some knowledge of law, even though he might not be a professional lawyer. He should be a person not too young, not too old, not too rigid in outlook. He should be able to view problems and cases with objectivity rather than sentimentality. He must be non-political, like a judge, and secure from interference. He must not be a member of the House, nor hold any office or remunerative employment. The attributes of the Swedish Ombudsman, expressed by Stephen D. Anderman in the American Journal of Comparative Law, are equally applicable to the local case:

"To be effective, the (Ombudsman) must maintain the respect of other public officials, the public, and particularly the (Parliament) who elect him. He must not be cowed by high-ranking officials, nor should he be unwilling when necessary to take an unpopular position. He must be a strong individual. He must also endeavour to remain above party politics. To a certain extent, the requirement of a judicial background aids in selecting a relatively non-political nominee."

### Method of appointment, provincial legislation, date of enforcement

The Office of the Ombudsman was opened during August 1975 upon the passing of the Parliamentary Commissioner (Ombudsman) Act, Chapter 285, Revised Statutes of Newfoundland, 1970.

The ombudsman should be appointed by the Lieutenant Governor on the recommendation of the House of Assembly. He would be an officer of the House, and responsible to the legislature as a whole.

The Protection of Human Rights: The Parliamentary Commissioner's Role

Every investigation by the commissioner under this Act shall be conducted in private.

If the commissioner believes that a complaint is justified, he may refer the matter to the deputy minister of the department or the administrative head of the agency, as the case may be. If, after an appropriate time, the commissioner believes that suitable action has not been taken, he may send a copy of the report and recommendations to the Lieutenant Governor in Council and shall thereafter make such report to the legislature on the matter as he thinks fit.

General Information

There can be no doubt that individual cases of dissatisfaction and reasonable grievance do, on occasion, exist and for this reason an ombudsman is desirable. The existence of the office has a healthy effect upon administrators and draws the attention of the public to government's concern that laws be fairly administered.



APPENDIX A - Legislation, Appointment, Term of Office

Province	Legislation	Effective	Appointed by	Term of Office
British Columbia	The Ombudsman Act	1977	Lieutenant Governor on the recommendation of the Legislative Assembly	6 years with possibility for re-appointment
Alberta	"	1967	"	5 years
Saskatchewan	"	1972	"	5 years with possibility of re-appointment for one additional term of 5 years
Manitoba	"	1969	"	6 years with possibility of re-appointment for one additional term of 6 years
Ontario	"	1975	"	10 years with possibility of re-appointment until age 65
Québec	The Public Protector Act	1968	approved by 2/3 of the National Assembly on motion by Prime Minister (Québec)	5 years with possibility of re-appointment for additional 5 years.
New Brunswick	The Ombudsman Act	1967	Lieutenant Governor on the recommendation of the Legislative Assembly	10 years with possibility of re-appointment
Nova Scotia	"	1970	"	5 years with possibility for re-appointment
Newfoundland	The Parliamentary Commissioner Act	1970	Lieutenant Governor on the recommendation of the House of Assembly	10 years with possibility of re-appointment until age 70

APPENDIX A - Legislation, Appointment, Term of Office (Continued)

Province	Legislation	Effective	Appointed by	Term of Office
Commissioner of Official Languages	Official Languages Act	1969		7 years
Privacy Commissioner	Part IV - Human Rights Act	1977	Minister of Justice on the recommendation of the Commissioner of CHRC	4 years with possibility of re-appointment
Correctional Investigator	The Inquiries Act	1973	Committee of the Privy Council on the recommendation of the Solicitor General	Commissioner to be appointed at pleasure

APPENDIX B

Number of Complaints Handled

PROVINCE	1977	1978
British Columbia	Offices not opened until 1979	Offices not opened until 1979
Alberta	1010	1010
Saskatchewan	835	1016
Manitoba	606	543
Ontario	6500-7200	6500 - 7200
Québec	6951	7139
New Brunswick	1235	1323
Nova Scotia	1000 (approx.)	1000 (approx.)
Newfoundland	550	479
Commissioner of Official Languages	1160	1092
Privacy Commissioner		581
Correctional Investigator	572 (June 1, 1977 to May 31, 1978)	1102 (June 1, 1978 to May 31, 1979)













